IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 867 OF 2000

Mahaya Chaitya Ozare ....Appellant.
(Orig.Accd.)

Versus

The State of Maharashtra ....Respondent.

Mr.Prakash Naik, Adv. for the appellant.

Mrs.U.V. Kejriwal, APP for the State.

CORAM: V.G. PALSHIKAR
AND
ANOOP V. MOHTA, JJ.

29.9.2004.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by Additional Sessions Judge, Palghar on 20.11.2000 in Sessions Case No.99 of 1997, the appellant-accused has preferred this appeal on the grounds mentioned in the memo of appeal.

2. With the assistance of learned counsel and the learned Assistant Public Prosecutor we have scrutinized and reappreciated the evidence on the record on the basis of which the learned trial Judge came to the conclusion of conviction.

3. The prosecution story as it emerges from our reappreciation of evidence stated briefly is that on 24.2.1997 the accused came to the house of the complainant and threatened the deceased to leave the village. In the afternoon they came back and assaulted the victim with wooden sticks. They also abused the deceased as a result of which assault the deceased fell to the ground and accused thereafter ran away. It is the case of the prosecution that after the victim was killed he was hanged by rope to the tamarind tree nearby and they the accused left the place. First Information Report was lodged on the next day. Investigation was carried, accused were arrested and on completion of investigation accused were prosecuted under section 302 of the Indian Penal Code. The prosecution has examined as many as seven witnesses to prove its case that it was the accused who committed murder. Accepting this evidence the learned trial Judge came to the conclusion of guilt and punished the accused as aforesaid. It is this order of conviction which is impugned in this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us. It was strenuously contended by the learned counsel appearing on behalf of the appellant that the order of conviction is illegal and therefore unsustainable in law. Admittedly recovery of weapon i.e. stick is not proved. The eye witnesses who say that the stick was used categorically state that the stick was not the one shown to them. Delay in lodging the F.I.R. is inordinate and wholly unexplained. The stick that has been seized has no blood stains and there are gross inconsistencies in the testimony of three eye witnesses. He therefore contended that the prosecution having miserably failed to prove the involvement of the accused the learned trial Judge could not have convicted the appellants. The learned Additional Public Prosecutor defended the order of conviction and submitted that P.W. 3 – Tulsi the

wife of the deceased is the eye witness. There is no reason why she would state falsehood. The discrepancies are not very serious and therefore the order of conviction is liable to be maintained.

4. P.W. 1 – Harshal Gavai is the doctor who conducted the post mortem. He has stated that the victim met homicidal death. The question is who was responsible for the said death.

5. P.W. 2 – Kashibai Vanga, P.W. 3 – Tulsi Vanga and P.W. 4 – Laxmi @ Vanita Vanga are the eye witnesses. P.W. 5 – Arvind Dhodi is hostile pancha. P.W. 6 – Sadashiv Thakare proves the panchnama of the dead body and P.W. 7 – Raju More is the investigating officer.

6. Admittedly there is no recovery of the weapon used. What has been shown to the witnesses does not have blood stains and the FIR was lodged 24 hours after the occurrence. We have to appreciate the ocular testimony of three eye witnesses in the light of this factually undisputed position.

7. P.W. 2 – Kashibai is the daughter-in-law of the victim Raghya. She describes the quarrel as under :

> "They were armed with Dandkas. Raghya was assaulted by both accused at various places of the body. Raghya died. Both the accused then hanged Raghya with nylon to tamarind tree."

She then states that her mother-in-law Tulsi and sister-in-law Vanita had also witnessed the incident. She then says that they went to the police station on the next day. The witness states that the assault occurred at 2.00 p.m. on 24.2.1997. The witness also states that they were extremely afraid by the incident which occurred in their presence and therefore she did not go to the police immediately. In cross examination this witness admits that the head injury received by her father-in-law was not bleeding but other injuries were oozing blood. If this is the factual position it is hard to believe that the stick with which injuries were caused had no blood stains. It is clear from the testimony of this witness that accused assaulted the victim with sticks, that there was bleeding injury and that after the victim was dead his body was hanged to a tamarind tree by means of nylon rope and the incident occurred around 2.00 p.m. on 24.2.1997. There is no explanation coming from this witness as to why report was not made till the morning next day. Assuming that the witnesses were fear stuck they would have remained so may be for a couple of hours. No plausible explanation is given by any of the eye witnesses as to why information was not given to the police as early as possible.

8. P.W. 3 – Tulsi is wife of the victim. She identifies the accused in the Court and states that the victim was assaulted by the accused. He sustained injuries, fell on the ground and thereafter accused No.2 hanged her dead husband to the nearby tamarind tree. She mentions that her daughters-in-law were present. The witness speaks of threat by accused which persuaded them not to interfere. Assuming that such threat was there and they could do nothing when the accused was present, it can even be assumed that they

could do nothing for few hours, thereafter the total inaction on their part of not even telling the neighbours or adjacent villagers about the gruesome attack on the victim is something which is unnatural. The witness then says that the blood had fallen on the ground but there is no recovery of blood stained mud.

9. P.W. 4 – Vanita is the third eye witness. She also mentions that the incident took place around 2.00 p.m., that the accused were having dandkas and they assaulted her father-in-law. She however asserts that both the accused hanged dead body of her father-in-law and very categorically says that in her examination in chief that muddemal sticks before the Court were not then with the accused. With these sticks, according to the witness, the victim was not beaten by the accused.

10. This in total is the evidence led by the prosecution and accepted by the learned trial Judge as enough. We are unable to agree with the learned trial Judge on his findings that this evidence is adequate. We do not accept the reasoning given by him. Our reasons for disagreement are as under:

11. Even if it is assumed that the assault took place at 2.00 pm. with lathis and the dead body was hanged by the accused there is no reason why after the fear was over none of the witnesses reported the matter to any body else. Even if it is assumed that there was threat administered to them by the accused after the accused ran away and couple of hours thereafter threat could not loom on their heads and in any event after such passage of time grief must take over the fear. The natural one conduct would be

immediate disclosure of the loss caused atleast to the neighbours. The conduct of all the three eye witnesses in not so disclosing is highly unnatural and creates doubt about veracity of their statement.

12. There is no explanation whatsoever coming forward on behalf of the prosecution regarding inordinate delay in lodging the FIR. Here again we have to observe that fear must lean about after the couple of hours. The incident is of 2.00 p.m. By 5.00 p.m. they could have reported the matter to the nearest police station. The failure on their part to do so, and making report only on the next day morning creates serious doubt as regards the reason for such delay and the possibility of they having decided to frame the accused persons cannot be over ruled. In any event, it creates serious doubt about the prosecution story and its correctness.

13. Then there are material contradictions in the testimonies of three eye witnesses. All of them are unanimous in saying that injuries oozed blood, yet there is no blood stained earth recovered nor was there any blood stain on the sticks. There is no recovery of the sticks which were actually used because all the witnesses say that muddemal properties in the Court were not sticks used for the assault by the accused. In the absence of weapon of attack, in the absence of any blood on the site with positive assertion of the witnesses that the assault resulted in injuries which oozed blood, are the glaring infirmities which go to the root of the matter. In the case of such discrepancies it was impermissible in law to convict the accused as was done by the trial Court. In the result, therefore appeal succeeds and is allowed. The appellant-accused be set at liberty if

otherwise not required.